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IN THE

Supreme Court of the United States

OCTOBER TERM 1944.

No. 606

NATIONAL SURETY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DELBERT M. TIBBETTS,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

JOHNS WEBB GRAHAM,
Of Counsel,
Cotton Exchange Building,
Houston, Texas.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner National Surety Corporation prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Fifth Circuit (R. 51) entered June 20, 1944, affirming a judgment (R. 15) of the United States District Court for the Southern District of Texas, Houston Division. A petition for rehearing was duly filed on July 5, 1944 (R. 52) which was denied by order entered July 18, 1944 (R. 57).

Action was instituted by the United States of America for the recovery of $1,000 on a bond given by National Surety Corporation as surety for Georgios Pateras, master of the *SS. Marouka Pateras,* against whom a fine of $1000 had been administratively imposed on account of the desertion of an alien member of the crew of his vessel. The District Court granted judgment for the plaintiff and on appeal the Circuit Court of Appeals affirmed.

Jurisdiction.

The order on mandate below was entered on July 18, 1944. Jurisdiction of this Court is provided by 28 U. S. C. s. 347 (a).

Opinions Below.

The opinion of the Circuit Court of Appeals was written by Judge Hutcheson, Judges McCord and Waller concurring (R. 43). Neither that opinion nor the opinion of the District Judge has been reported. The opinion of District Judge Kennerly appears at pages 15, 21 of the record and that of the Court below at pages 43, 51 of the record.

Statutes and Regulations Involved.

The statutes and regulations primarily involved are sections 3 (5), 19, 20 (a), 15 and 24 of the Immigration Act of 1924, Executive Order 8429 of June 5, 1940, Acts of May 22, 1918, March 2, 1921, Rule 7 of the Immigration Rules and Regulations, and sections 15 and 16 of the Immigration Act of 1917, the pertinent portions of which are set forth in an appendix hereto.

Questions Presented.

1. Whether a surety on a bond to secure clearance of a vessel of the principal pending determination of liability of the principal for an immigration fine, may invoke the defenses of the principal in an action against the surety where the principal was not made a party.

2. Whether a notice to detain an alien seaman under Executive Order 8429, (appendix p. 17) can be invoked for a fine under Section 20 (a) of the Immigration Act of 1924, (appendix p. 15) notwithstanding the fact that the Immigration Act of 1924 does not grant any authority to the President to issue orders and regulations relating to immigration.

3. Whether a boarding inspector, as distinguished from the immigration officer in charge at the port of arrival can issue a valid notice to detain, as the basis for a fine under Section 20 (a) of the Immigration Act of 1924.

The Facts.

The facts were stipulated by the parties (R. 10, 12). The stipulated facts show that on arrival of the *SS. Marouka Pateras* in Bolivier Roads, Texas, the alien seaman Salvador Pauruga was ordered detained on board the vessel by a boarding inspector of the immigration service for the sole and only reason that he was not in possession of an identifying travel document in the nature of a passport as required by Executive Order 8429. He had complied with all requirements of the Immigration laws and regulations in that he was a bona fide seaman serving on the vessel as an employee thereof, had signed on her articles in good faith; his name appeared on the duly visaed crew list of the vessel and he entered the United States solely in connection with the business of the vessel as a bona fide seaman with no intention of abandoning his calling, thus showing full compliance with all provisions of the immigration laws and regulations, and particularly all requirements of Immigration Act of 1924. If he had had a document in the nature of a passport he would have been granted shore leave.

After his detention he escaped from the ship despite diligent and customary efforts to detain him.

A notice of fine was issued and served on the master and clearance of the vessel was denied by the Collector of Customs until the master posted a bond with National Surety Corporation as surety. Thus the bond was exacted under duress.

Subsequently a fine of $1,000 was imposed by administrative action and suit was brought against the surety, but not against the principal, to recover the amount of the fine.

The District Judge considered that defenses available to the principal were open to the surety, but granted judgment for the plaintiff on erroneous reasons that were not sustained or discussed by the Appellate Court.

Decision of the Court of Appeals.

On this record the Circuit Court of Appeals affirmed the judgment of the District Court, primarily on the ground that the defendant surety company could not avail itself of defenses that might be available to the principal, on the fallacious theory that liability had become fixed on the bond solely by reason of the fact that a notice to detain had been issued by an immigration inspector and the seaman had escaped from the vessel.

Secondarily, the Court held that even if the surety could invoke defenses of the principal, no valid defenses existed.

Defenses That Were Available.

The following defenses were available to the principal on the bond:

1. Section 20 (a) of the Immigration Act of 1924, (appendix pp. 15, 16) under which the fine was imposed, as supplemented by sections 19, 15 and 24, (appendix pp. 15, 16) contemplated fines only when there was a failure of compliance with Rule 7 of the regulations under the Act, (appendix pp. 19, 20). The seaman admittedly met all those requirements, and no basis existed for the issuance of a notice to detain.

2. Executive Order 8429, (appendix p. 17) which it is contended was based on a non existent statute, (appendix pp. 19, 20), made an additional condition to shore leave, i.e. the possession of a passport or document of that nature. Whether valid or not, the Executive Order could only be enforced through the sanction, if any, provided in the law on which it is based. It did not and could not invoke any authority in the Immigration Act of 1924 and could not be enforced through that Act.

3. Finally, Section 20 (a) of the Act of 1924, provides for fines for failure to detain a seaman if the detention is required by "the immigration officer in charge at the port of arrival" or the Secretary of Labor. No such notice to detain was issued. It was issued by a boarding inspector and consequently was invalid. Sections 15 and 16, Immigration Act of 1917, (appendix p. 21).

Reasons for Granting Writ.

1. The decision of the Court below is in conflict with decisions of other Federal Courts as follows:

a. With the Circuit Court of Appeals for the Fourth Circuit in *National Surety Co.* v. *Holtzman*, 43 F. (2d) 544, 546; the Circuit Court of Appeals for the 2nd Circuit in

United States v. *Columbus Marine Corporation,* 62 F. (2d) 795, 796; *Bank Line Ltd.* v. *United States,* 96 F. (2d) 52, 54, and *Durning* v. *McDonnell,* 86 F. (2d) 91, as well as the general law of suretyship, Stearns on Suretyship, 3rd Ed. Sec. 102 and 21 R. C. L. 974, in holding that defenses available to the principal are not available to his surety.

b. In principle, with the decision of the Circuit Court of Appeals for the First Circuit in *Johnson* v. *Keating,* 17 F. (2d) 50, 52 and an Opinion by Attorney General Jackson, 39 Op. 509, 515, 516, in holding that a fine could be validly imposed under Section 20 (a) of the Immigration Act of 1924 on the basis of a notice to detain that was issued solely under the provisions of Executive Order 8429.

c. With a decision of the Court of Claims in *Rio Cape Line* v. *United States,* 89 Ct. Cls. 307, 316, 317, in holding that a fine may be imposed on the basis of a notice to detain by a boarding inspector instead of the immigration officer in charge.

2. The application of Executive Order 8429 by boarding inspectors has resulted and will continue to result in severe and unjust hardships and losses to steamship owners and operators, through interference with the operations of vessels, the expenses involved in attempts to comply with detention notices and huge fines, often amounting to many thousands of dollars on a single arrival, on account of the desertion of seamen who have been ordered detained by a boarding inspector solely on the basis of Executive Order 8429. Consequently the importance of the issues involved is not confined to this case, but extends to all owners and operators whose ships call at ports of the United States with alien crews.

3. Our allies in the present war have been the principal victims of the application that has been made of

Executive Order 8429. Their war efforts have been seriously impeded by the incarceration of large bodies of seamen aboard, with resulting mutiny, or discontent, plus fines of $1000 per man for all who succeeded in escaping from their guards, and the seaman themselves have suffered the indignity of forcible detention for no crime other than failure to have a passport, a document which never before had been required for shore leave of alien seamen. Under the immigration laws it was necessary for the crew list of alien seamen to be visaed by an American Consul. In this case and practically all others that requirement had been fulfilled. Congress in passing the 1924 Immigration law certainly could not have contemplated the disgraceful situation that has been created by the administrative application of section 20 (a) of that act to enforce the provisions of Executive Order 8439. The question presented is one of serious public importance which warrants the consideration of this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Fifth Circuit should be granted.

DELBERT M. TIBBETTS,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

JOHNS WEBB GRAHAM,
Of Counsel,

Cotton Exchange Building,
Houston, Texas.